

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LVC SURGICAL CENTER, LLC, a Nevada Limited Liability Corporation;

Case No. 2:19-cv-01734-RFB-BNW
ORDER

Plaintiff,

V.

INSIGHT SURGICAL EQUIPMENT CO, an Arizona Corporation; DOES 1 through 10, inclusive; and ROE BUSINESS ENTITIES I through X, inclusive,

Defendant.

I. INTRODUCTION

Before the Court is Plaintiff's Renewed Motion for Preliminary Injunction (ECF No. 20), Defendant's Response (ECF No. 23), and Plaintiff's Reply (ECF No. 27). Because Plaintiff has failed to demonstrate irreparable harm, that the balance of the equities favors Plaintiff, and that a preliminary injunction is in the public interest, the Court denies the Motion.

II. PROCEDURAL BACKGROUND

Plaintiff filed the operative complaint in this action in the Eighth Judicial District Court on September 12, 2019, asserting several causes of action against Defendant related to a contract to deliver equipment for use in Plaintiff's ambulatory surgical center. ECF No. 1-2. Defendant filed the Petition for Removal to federal court on October 4, 2019. ECF No. 1. On October 7, 2019, Plaintiff filed a Motion for Preliminary Injunction. ECF No. 3. The Court ordered briefing on the motion, ECF No. 8, and a hearing was held on October 16, 2019, ECF No. 13. The Court denied

1 the motion without prejudice at the hearing, referred the action to the magistrate judge for the
2 purposes of settlement mediation, and ordered the parties to file a joint status report “identifying
3 each piece of equipment under the contract, the relevant industry standard or certification protocol
4 for the identified equipment if applicable, when the equipment must be certified if required and
5 who is responsible for ensuring that it is compliant, and a detailed description of the certification
6 process by the State of Nevada,” as well as any indication of disagreement as to these items. Id. A
7 settlement conference was ordered for January 3, 2020. ECF No. 14. On October 21, 2019,
8 Defendant filed a Notice of Related Cases. ECF No. 15. On October 30, 2019, the parties filed
9 separate status reports. ECF No. 16, 17. On November 4, 2019, Plaintiff filed the instant motion
10 pursuant to the Court’s Order issued on October 31, 2019 in response to the parties’ respective
11 status reports (ECF No. 18). ECF No. 20. Defendant responded on November 13, 2019, ECF No.
12 23, and Plaintiff replied on November 15, 2019, ECF No. 27.

13 **III. FACTUAL BACKGROUND**

14 The controversy arises out of an alleged breach of contract. Plaintiff alleges that Defendant
15 failed to provide conforming equipment for use in Plaintiff’s ambulatory surgical center in
16 accordance with their contract, and that delivery of the equipment was continually delayed.
17 Defendant disputes the equipment was non-conforming and states that the delay was the
18 consequence of Plaintiff’s own conduct. With regard to whether the equipment conformed to the
19 terms of the contract, the parties disagree, *inter alia*, about which standards apply to the
20 certification of the equipment for use in the ambulatory surgical center, whether those standards
21 have been satisfied for the delivered equipment, whose responsibility it is to ensure compliance
22 with those standards, and when the equipment must be deemed in compliance.

23 The Court makes the following factual findings. On May 28, 2018, the parties entered into
24 the contract for Defendant to deliver to Plaintiff specified goods for use in the ambulatory surgical
25 center. The original delivery date was delayed but an agreement on a revised delivery date was
26 reached on or about April 19, 2019. ECF No. 20 at 3. Defendant provided a projection for delivery
27 dates beginning May 1, 2019 that asserted all equipment would be delivered by June 14, 2019. Id.
28 Plaintiff asserts the delivery of this equipment was continually delayed and has not yet been

1 provided in full. Id. at 4. Plaintiff further asserts the equipment has not been certified for use in the
2 ambulatory surgical center in accordance with the various certification procedures, resulting in
3 delay of the opening of the surgical center. Id. at 4-13.

4 On June 10, 2019, Plaintiff sent Defendant a letter proposing new dates for items as yet
5 undelivered under the original schedule. Id. at 3. Plaintiff also told Defendant in this letter that it
6 expected perfect tender on or before June 14, 2019. Id.

7 On June 17, 2019, Plaintiff sent Defendant an email asking for an update relating to the
8 delivery of the remaining equipment, id. at 4, and on June 25, 2019 sent another email requesting
9 an update on delivery with notice that “22 separate pieces of equipment or 51% of the order still
10 had not been delivered,” id. On July 31, 2019, Plaintiff asserts equipment was still outstanding. Id.
11 Plaintiff gave Defendant a new deadline of August 21, 2019 to tender the certified equipment, then
12 an additional extension until August 28, 2019. Id. On August 23, 2019, Plaintiff sent Defendant a
13 demand for adequate assurances of performance for delivery by August 28, 2019 and put
14 Defendant on notice of its failure to provide conforming equipment that would be fit for the
15 surgical center’s particular purpose. Id.

16 Defendant’s sales representative, Brian Case, sent an email on August 27, 2019
17 acknowledging receipt of an Excel spreadsheet listing delivered items and their deficiencies. Id.
18 On August 29, 2019, due to Defendant’s alleged failure to address the demand letter and/or provide
19 the missing equipment, Plaintiff declared default and demanded that Defendant remove the
20 allegedly non-conforming equipment from the surgical center. Id. at 6.

21 On September 3, 2019, Plaintiff’s attorney provided Defendant’s counsel a list indicating
22 Defendant had only delivered 61% of the ordered equipment, of which 70% was “defective/not
23 certified,” and told Defendant that an autoclave Defendant installed was defective because it was
24 not certified by the State of Nevada and would subject Plaintiff to state fines of up to \$5,000. Id.
25 at 6-7. Plaintiff reiterated this message on September 5, 2019 and Defendant’s counsel stated
26 Defendant would have the boiler removed. Id. at 8. Plaintiff asserts that it told Defendant on
27 September 24, 2018 via email of the applicable requirements for autoclave installation and
28

1 certification. Id. Plaintiff argues Defendant failed to meet these requirements and that on
2 September 6, 2019, attempted to install an autoclave that had not been certified by Nevada. Id.

3 Defendant states Plaintiff is responsible for the delay in delivery and asserts a slightly
4 different timeline of events. On March 13, 2018, Defendant tendered an invoice memorializing the
5 agreement with Plaintiff and requested a 60% deposit pursuant to standard practice. ECF No. 23
6 at 3. This deposit was paid in June 2018 after some delay. Id. at 3-4. LVC principal Ngan Le
7 informed Defendant shortly thereafter that construction of the surgical center was delayed and the
8 October 2018 installation deadline would not be met. Id. at 4.

9 In October 2018, another LVC principal, Dr. Thomas Le, requested a meeting to establish
10 a second quote for another medical center which was finalized later that month. Id. The deposit for
11 the second surgical center was negotiated as a loan. Id. Defendant asserts Plaintiff's architects
12 caused a seven-month delay in preparing the surgical center for an issuance of a Certificate of
13 Occupancy, which was issued in May 2019. Id.

14 After issuance of the Certificate of Occupancy, Defendant delivered and installed an
15 autoclave which Defendant believes, in contrast with Plaintiff, is compliant with Nevada standards.
16 Id. at 5. Defendant asserts that throughout July 2019, approximately \$298,000 worth of equipment
17 and the "C-Arm" was delivered and installed. Id. From July to August 2019, Defendant asserts
18 that it worked to deliver the remaining equipment but received conflicting instructions from Ngan
19 and Dr. Thomas Le. Id. at 6. Defendant states Ngan Le instructed Defendant not to deliver
20 additional medical equipment until the permits were obtained for the C-Arm and autoclave. Id. at
21 5. Defendant asserts the C-Arm was deemed safe on August 29, 2019 and a new autoclave was
22 ordered and ready for overnight delivery as of September 3, 2019. Id. Defendant states that on
23 September 6, 2019 the boiler portion of the autoclave was removed. Id. Defendant disputes that
24 the original autoclave was unfit for its intended use. Id.

25 Brian Case met with Dr. Thomas Le and Ngan Le and received instructions on how to
26 proceed with delivery of the outstanding equipment. Id. at 6. On September 6, 2019, Defendant's
27 counsel, Ernest Bustamante, responded to Plaintiff's demand letter and informed Plaintiff's
28 counsel that Defendant was receiving conflicting instructions which made it difficult to determine

1 who had authority to speak for LVC. *Id.* Bustamante also provided a proposed timeline for the
2 remaining items to be delivered and Defendant asserts that until that time, it was prohibited from
3 completing delivery. *Id.* at 5-6. Defendants states that previously, on August 27, 2019, Brian Case
4 attempted to schedule delivery of the remaining equipment and that on August 28, 2019, Ngan Le
5 responded that he would forward the email to his attorney. *Id.* at 6.

6 **IV. LEGAL STANDARD**

7 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a
8 clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.,*
9 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements:
10 “(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm
11 in the absence of preliminary relief, (3) that the balance of equities tip in its favor, and (4) that the
12 public interest favors an injunction.” *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d
13 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing *Winter*, 555 U.S. 7, 20 (2008)).

14 “A preliminary injunction can take two forms. A prohibitory injunction prohibits a party
15 from taking action and preserve[s] the status quo pending a determination of the action on the
16 merits. A mandatory injunction orders a responsible party to take action.” *Marlyn Nutraceuticals,*
17 *Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 878-79 (9th Cir. 2009). A mandatory injunction
18 “goes well beyond maintaining the status quo pendente lite [and] is particularly disfavored. The
19 district court should deny such relief unless the facts and law clearly favor the moving party.” *Garcia v. Google, Inc.,* 786 F.3d 733, 740 (9th Cir. 2015) (alteration in original) (citation and
20 internal quotation marks omitted). “The status quo means the last, uncontested status which
21 preceded the pending controversy.” *N.D. ex rel. Parents v. Haw. Dep’t of Educ.,* 600 F.3d 1104,
22 1112 n.6 (9th Cir. 2010) (citation and internal quotation marks omitted).

23 A court may only issue a preliminary injunction “if the movant gives security in an amount
24 that the court considers proper to pay the costs and damages sustained by any party found to have
25 been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). District courts have discretion in
26 setting the amount of bond. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir.
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1 2004). A likelihood of success on the merits can “tip[] in favor of a minimal bond or no bond at
2 all.” People of State of Cal. v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1326 (9th Cir. 1985).

3 **V. DISCUSSION**

4 **A. Preliminary Injunction**

5 Plaintiff requests that the Court grant the instant motion and direct Defendant to remove
6 all of the equipment or permit Plaintiff to remove the equipment at Defendant’s cost. Plaintiff
7 commits the vast majority of its brief to the first prong of Winter: a likelihood of success on the
8 merits. The Court need not consider whether Plaintiff has succeeded in satisfying this element for
9 a preliminary injunction however, as the Court finds that Plaintiff has not satisfied Winter’s
10 remaining prongs, including irreparable harm, balance of the equities, and that the public interest
11 favors an injunction.

12 “[A] preliminary injunction usually will be denied if it appears that the applicant has an
13 adequate alternate remedy in the form of money damages or other relief.” 11A Charles Alan
14 Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 2019). “The basis of
15 injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies.” Los
16 Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980)
17 (citing Sampson v. Murray, 415 U.S. 61, 88 (1974)). “The temporary loss of income, ultimately to
18 be recovered, does not usually constitute irreparable injury . . . The key word in this consideration
19 is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily
20 expended in the absence of a stay, are not enough. The possibility that adequate compensatory or
21 other corrective relief will be available at a later date, in the ordinary course of litigation, weighs
22 heavily against a claim of irreparable harm.” Sampson, 415 U.S. at 90 (internal citations and
23 quotations omitted). “[I]ntangible injuries, such as damage to ongoing recruitment efforts and
24 goodwill, qualify as irreparable harm.” Rent-A-Ctr., Inc. v. Canyon Television & Appliance
25 Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) (citation omitted).

26 Plaintiff devotes a single paragraph to the issue of irreparable harm, asserting in its original
27 motion that “the nonconforming Equipment substantially impaired the value of the rest of the
28 Equipment since LVC cannot use the Equipment for the [ambulatory surgical center].” ECF No.

1 20 at 25-6. Plaintiff then goes on to reiterate its legal right to reject the equipment and demand its
2 removal, as well as to state that removal is needed in order to commence work with another medical
3 equipment supplier to complete the ambulatory surgical center. Id. at 26. Defendant argues in its
4 opposition that Plaintiff's assertions fail to illustrate "immediate threatened harm" as required.
5 ECF No. 23 at 19 (quoting Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir.
6 1988)). In its reply, Plaintiff states it is losing money as a consequence of a delayed opening, that
7 these losses will "effectively put LVC out of business," and asserts, without citation, that damages
8 are not an adequate remedy as Defendant cannot satisfy a judgment in Plaintiff's favor. ECF No.
9 27 at 11.

10 The harm Plaintiff has asserted—loss of income as a consequence of its inability to open
11 the ambulatory surgical center—can be adequately addressed with legal remedies. More
12 importantly, Plaintiff's own admissions make plain that Plaintiff need not resort to this Court to
13 end its predicament. Plaintiff indicates in its brief that it has engaged in communication with
14 Defendant about how it plans to implement moving the equipment to storage in the event Plaintiff
15 "elect[s]" to do so. Ex. 31 at 1, ECF No. 20. Additionally, Plaintiff has indicated that it has already
16 contacted and sought quotes from moving companies for this purpose. ECF No. 20 at 27.
17 Moreover, in its status report, Plaintiff acknowledged these preparations, and stated, "Unless this
18 Honorable Court is inclined to reconsider the Mandatory Injunction, then LVC will likely need to
19 resort to this measure to mitigate its damages." ECF No. 16 at 13. Plaintiff further states in this
20 status report that it "prefers to have a Court Order setting forth the requirements related to the
21 removal of the Equipment" but in the event the instant motion is denied, Plaintiff "will have to
22 pursue the self-help remedies permitted under Nevada law." Id. at 14. These assertions suggest
23 that Plaintiff seeks relief from this Court not as a last resort, but as a convenience, and tacit judicial
24 endorsement of Plaintiff's conduct before the fact. It is evident therefore, that Plaintiff need not
25 resort to the "extraordinary remedy" of a preliminary injunction in order to garner the relief it
26 seeks. Though Plaintiff further asserts that Defendant cannot cover the potential monetary damages
27 at issue here, Plaintiff cites to no evidence to support that contention.

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1 Additionally, though Plaintiff appropriately cites Winter's standard for a preliminary
2 injunction, it inexplicably fails to make any argument whatsoever as to the balance of the equities
3 and the public interest. This failure, as well as Plaintiff's failure to show irreparable harm,
4 necessarily means Plaintiff has failed to meet the very high burden for a mandatory preliminary
5 injunction. The Motion is denied.

6 **B. Writ of Attachment**

7 Plaintiff also seeks a prejudgment writ of attachment pursuant to Rule 64 of the Federal
8 Rules of Civil Procedure and Nevada Revised Statutes § 31.010. Plaintiff wishes to hold the
9 equipment already delivered to “secure its damages, or, alternatively, a writ of attachment, which
10 should attach to the Equipment.” ECF No. 20 at 27.

11 Rule 64 of the Federal Rules of Civil Procedure states, *inter alia*, that “At the
12 commencement of and throughout an action, every remedy is available that, under the law of the
13 state where the court is located, provides for seizing a person or property to secure satisfaction of
14 the potential judgment.” Subsection (b) of Rule 64 further states that “attachment” is a remedy
15 available under the rule. Nevada law does allow for attachment as a remedy. NRS 31.010. NRS
16 31.010 allows for a plaintiff to “apply to the court for an order directing the clerk to issue a writ of
17 attachment and thereby cause the property of the defendant to be attached as security for the
18 satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such
19 judgment” NRS 31.013 details the cases in which a court may order a writ to issue after notice
20 and hearing. NRS. 31.017 details the cases in which a writ may be issued without notice. It states,
21 *inter alia*, that one such case is “[i]n an action by a resident of this State against a defendant not
22 residing in this State.” However, it clarifies that “domestic corporations and foreign corporations
23 who are doing business in this State and who have qualified to do business in this State as required
24 in chapter 80 of NRS shall be deemed residents of this State.” Additionally, all applications for a
25 writ of attachment without notice are required to include a detailed affidavit. NRS 31.020.

26 Plaintiff appears to seek a writ of attachment without notice to the defendant, pursuant to
27 NRS 31.017, though it is not entirely clear. See ECF No. 20 at 27-9; ECF No. 27 at 11-12. The
28 Court denies the application for a writ of attachment without notice to Defendant. It is unclear, as

1 an initial matter, if Defendant qualifies as a domestic corporation that is exempt from the "no
2 notice" provision of NRS. 31.017. Furthermore, the Court was unable to locate in Plaintiff's filings
3 an affidavit in accordance with the statute's requirements.

4 If Plaintiff wishes to apply for a writ of attachment pursuant to the notice and hearing
5 requirements laid out in NRS 31.013, it may renew its application in a separate filing.

6 **VI. CONCLUSION**

7 **IT IS THEREFORE ORDERED** that Plaintiff's Renewed Motion for Mandatory
8 Injunction (ECF No. 20) is **DENIED**.

9 **IT IS FURTHER ORDERED** that Plaintiff's application for a Writ of Attachment is
10 **DENIED** without prejudice. Plaintiff may re-file the application separately, pursuant to the notice
11 and hearing requirements laid out in NRS 31.013.

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13 DATED: December 11, 2019.



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15 **RICHARD F. BOULWARE, II**
16 **UNITED STATES DISTRICT JUDGE**
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